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Anna R. Bradshaw*

ORIGINAL

TRANSCRIPT OF PROCEEDINGS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF:

WT DOCKET NO. 95-26

Commercial Realty St. Pete, Inc.,
James C. Hartley, Teresa Hartley,
and Ralph E. Howe

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James C. Hartley, Teresa Hartley, :
and Ralph E. Howe :
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The above-entitled matter came on for prehearing
conference pursuant to notice before Judge Steinberg,
Administrative Law Judge, at 2000 L Street, N.W., Suite 201,
Washington, D.C. in Courtroom Number 3, on Wednesday, March
29, 1995 at 10:00 a.m.

APPEARANCES:

On behalf of the Wireless Telecommunications Bureau:

JOSEPH PAUL WEBER, ESQUIRE
TERRENCE E. REIDELER, ESQUIRE
Federal Communications Commission
1919 M Street, N.W.
Room 644
Washington, D.C. 20554

On behalf of Commercial Realty St. Pete, Incorporated,
James C. Hartley, and Teresa Hartley:

LAUREN COLBY, ESQUIRE
Ten East Fourth Street
Frederick, Maryland 21701

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Opening statement by Judge Steinberg

2

Conference Began: 9:30 a.m. Conference Ended: 11:00 a.m.

P R O C E E D I N G S

9:30 a.m.

JUDGE STEINBERG: This is a prehearing conference in WT Docket Number 95-26 involving a question of whether Commercial Realty St. Pete, Inc. or CRSPI, that's C-R-S-P-I, James C. Hartley, Teresa Hartley, and Ralph E. Howe should be barred from participating in future Commission auctions or from holding Commission licenses.

The Commission designated this case for hearing by Order to Show Cause released February 16, 1995. By order released February 23, 1995, the chief administrative law judge assigned the case to me and scheduled a prehearing conference for today. Let me take the appearances now. For Commercial Realty St. Pete, Inc.?

MR. COLBY: Lauren A. Colby.

JUDGE STEINBERG: For James C. Hartley?

MR. COLBY: Lauren A. Colby.

JUDGE STEINBERG: For Teresa Hartley?

MR. COLBY: Lauren A. Colby.

JUDGE STEINBERG: Ralph E. Howe?

(No response.)

JUDGE STEINBERG: Let the record reflect no response. And for the record, Mr. Howe filed -- attempted to file a Notice of Appearance which I dismissed for various reasons which are contained in the Memorandum of Opinion and

1 Order that was released earlier this month. For the Chief,
2 Wireless Telecommunications Bureau?

3 MR. WEBER: Joseph Paul Weber.

4 MR. REIDELER: Terrence E. Reideler.

5 JUDGE STEINBERG: I don't have any pleadings pending
6 before me. Is that correct?

7 MR. COLBY: That's correct.

8 JUDGE STEINBERG: Now, I sort of have an agenda and
9 I'm going to cover a lot of things. I'm going to cover some
10 things on my own and then I'm going to ask if there's anything
11 that you want to cover. The first thing is settlement. Is
12 there any possibility that this case can be settled?

13 MR. COLBY: Yes.

14 JUDGE STEINBERG: Have any discussions taken place,
15 et cetera, et cetera?

16 MR. COLBY: Yes. There have been some discussions.
17 They're very preliminary at this point, but we're going to
18 have a further settlement discussion by telephone, by
19 conference call on Friday. I think there's a basis for
20 settling the case. I think it will settle myself.

21 JUDGE STEINBERG: Do you want to add anything?

22 MR. WEBER: The Bureau is indeed discussing
23 settlement with Commercial Realty at this point. An initial
24 offer for settlement was made. It was rejected by the Bureau.
25 But we are continuing discussions with Commercial Realty.

1 JUDGE STEINBERG: My thoughts on that is I think
2 it's frankly ludicrous that this case go to hearing unless
3 CRSPI or one of the Hartleys intends to participate in
4 auctions in the future. If they don't intend to participate,
5 I don't see why they couldn't reach an agreement to that
6 effect, saying hey, you know, we're not going to play this
7 game anymore and therefore, the heck with you.

8 Or we're not going to play this game anymore for X
9 number of years and the heck with you and if we come back and
10 we decide later we want to play this game, then we'll address
11 these matters, which I think makes a lot more sense than
12 addressing them now and wasting a lot of money. But those are
13 my informal sort of off-the-record/on-the-record thoughts.

14 The next thing I want to cover is the scope of some
15 of the issues in case this proceeding does go to hearing, and
16 the first one I want to talk about is Issue Three. Issues --
17 but before I say that, I wanted to say Issues One, Two, and
18 Four, the way they're written, seek to develop the facts and
19 circumstances surrounding certain misconduct alleged in those
20 issues.

21 Issue Three, on the other hand, doesn't have
22 anything about facts and circumstances. It just says whether
23 certain contacts or communications were improper. Actually,
24 it doesn't say whether they were improper, it says whether the
25 improper communications should result in a certain sanction.

1 I don't see any reason explained in the H.D.O. for the
2 distinction between the way Issues One, Two, and Four are
3 written and the way Issue Three is written.

4 So what I'm going to do, in order to insure a full
5 and complete record in this case, I'm going to allow the
6 parties to develop the facts and circumstances surrounding
7 CRSPI or its principals' communications with Christopher -- is
8 it Pedersen?

9 MR. COLBY: Pedersen.

10 JUDGE STEINBERG: Pedersen, okay. It's just
11 pronounced -- I mean, spelled differently. Based on the
12 evidence adduced with respect to those facts and
13 circumstances, then it will be determined whether the
14 communications were improper and whether they should bar CRSPI
15 and/or principals from any future auctions and from holding
16 Commission licenses. I think that would be a better way to
17 approach it. Does anybody have any problem with that?

18 MR. COLBY: No, Your Honor.

19 MR. WEBER: No problem, Your Honor. But I have a
20 comment as to why Issue Three was different from the other
21 issues. As to Issue Three, that was an actual finding by the
22 Commission that this was an improper contact and in a separate
23 order, the Commission issued a Notice of Apparent Liability
24 for forfeiture against Ms. -- or against Commercial Realty for
25 those contacts. So it was actually already determined by the

1 Commission that this was a finding and therefore, there was no
2 need to look into the facts and circumstances surrounding it.

3 JUDGE STEINBERG: Well, the way I read the Order to
4 Show Cause -- improper communications, Section C, Paragraph 18
5 through whatever. I don't -- I don't
6 -- I have to operate under the language in the Order to Show
7 Cause and I don't read Paragraphs 18 through 20 to be a
8 finding. I read them to be allegations that have to be
9 proven. The language in Paragraph 20 seems to track the
10 language -- there's similar language in Sections A and B in
11 terms of these are the charges.

12 MR. WEBER: Paragraph 20 actually goes to Issue
13 Number Four. It's Paragraph 18 that goes to Issue Number
14 Three.

15 JUDGE STEINBERG: Maybe I misread it then. Well,
16 it's unclear to me. But you can always -- I'd rather be safe
17 and develop the facts and circumstances and then we can argue
18 whether they were proper or improper. But I understand what
19 you're saying. It's just not clear to me from the Order to
20 Show Cause that this is what the Commission intended to do.
21 If I'm wrong, I don't see that there's any harm done. It
22 wouldn't be the first time I was wrong.

23 MR. COLBY: May I make two comments? The first is
24 that CRSPI has and -- has denied liability under the Notice of
25 Apparent Liability. We have problems.

1 JUDGE STEINBERG: Why doesn't that -- I'm shocked
2 that you denied liability. Let the record reflect sarcasm.

3 MR. COLBY: And in denying liability, we denied that
4 the contacts were, in fact, improper. The second comment I
5 would make is there are a long line of Commission cases and
6 Supreme Court which have upheld the Constitutionality of
7 Section 403 of the Communications Act, the investigatory
8 section, on the grounds that the information developed in an
9 investigation cannot be used to adjudicate anything. It can
10 only be used in a future proceeding which is adjudicatory and
11 that's -- in nature.

12 So on the basis of a couple of Supreme Court cases
13 and a long line of Commission cases, I would think that
14 anything developed in an adjudicatory proceeding cannot be
15 used as a finding that's binding upon -- pardon me, anything
16 developed in an investigatory proceeding cannot be used as a
17 finding of fact in a subsequent adjudicatory proceeding. The
18 cases on that --

19 JUDGE STEINBERG: I don't need -- I don't need the
20 citations. If it comes to that, then you can give me the
21 citations. But I think what we'll do is we'll take the long
22 way which is the way I described.

23 MR. WEBER: May I ask Counsel a question, Your
24 Honor?

25 JUDGE STEINBERG: Sure.

1 MR. WEBER: You stated that you opposed or denied
2 liability under the forfeiture. Has that been filed with the
3 Commission and served on the parties?

4 MR. COLBY: I wonder if we did serve that on the
5 parties. I don't think we thought we had to serve that on the
6 parties, although I would've been glad to do so.

7 MR. WEBER: If I have not -- I have not seen any --

8 MR. COLBY: I will be very glad to send you a copy.

9

10 JUDGE STEINBERG: Why don't you send me one? What
11 the heck.

12 MR. COLBY: I will.

13 JUDGE STEINBERG: Or maybe I shouldn't have one. Of
14 course -- no, I don't want one because these cases, the
15 forfeiture, the N.A.L., and the Order to Show Cause is
16 supposed to be on separate tracks done by separate parts of
17 the Commission and so I don't want to see it.

18 MR. COLBY: But I will serve Wireless Counsel with a
19 copy of that by FAX today.

20 JUDGE STEINBERG: The next question I have relates
21 to Issue Five and here I'm really confused. Let me ask the
22 Wireless Bureau a question. Obviously you're familiar with
23 the N.A.L. Is that right?

24 MR. WEBER: That's correct.

25 JUDGE STEINBERG: Is the misconduct that's alleged

1 to have occurred in the N.A.L. the same misconduct that's
2 alleged in the Order to Show Cause? In other words, are the
3 rule violations -- is CRSPI and the Hartleys and Mr. Howe
4 being charged with -- in the N.A.L. with the same rule
5 violations as they're being charged with in this case?

6 MR. WEBER: I mean, I believe, Your Honor, there are
7 separate allegations raised in the N.A.L. There are certainly
8 conclusions reached in that that are different than what's in
9 the Order to Show Cause because this is more just saying
10 there's -- that it's looking into the questions around
11 particular areas such as the N.A.L. did conclude that Mr.
12 Hartley misrepresented his financial status. While that is an
13 issue here as to whether or not he falsified certifications to
14 the Commission, it was determined in the N.A.L. that in each
15 of the twenty markets, that he was the successful bidder
16 because he did not have proper finances, he was assessed a
17 particular forfeiture amount for each market.

18 JUDGE STEINBERG: The question that I had basically
19 was Issue Five says whether based on the totality of the
20 evidence adduced pursuant to certain issues -- and this is the
21 problem that I have, "and the violations of the Commission's
22 rules established in the N.A.L., Commercial Realty," et
23 cetera, et cetera.

24 The question I have is the N.A.L. is subject to
25 challenge and as far as I'm concerned, until that challenge is

1 resolved, nothing has been "established." So how in the world
2 am I supposed to resolve Issue Five if the N.A.L. hasn't been
3 resolved?

4 And then the question becomes if the N.A.L. rejects
5 the challenge and says you're guilty of this, this, this,
6 this, this, and this misconduct, that's a finding by the
7 Commission or a holding by the Commission that they are --
8 that they're guilty of this, this, this, this, this, and this
9 misconduct and wouldn't I be bound by that? How can I -- how
10 can I say there was no misrepresentation based on this
11 evidentiary record when the Commission's already found a
12 misrepresentation?

13 How can I find that they should -- that they, for
14 instance, misrepresented the fact that they were 50.1 percent
15 controlled and owned by Mrs. Hartley, how can I say they
16 weren't if the Commission found that they were? If the
17 Commission imposes a forfeiture for what I -- for misconduct
18 which is -- I mean, there's only one set of underlying facts
19 here. We don't have one set of facts for the N.A.L. and
20 another set of facts for my issues. There's one set of facts.

21 How can I find -- how can I find that this
22 misconduct doesn't warrant a forfeiture when the Commission
23 says it did? Or vice versa. How can I find that it does
24 warrant a forfeiture when the Commission says it doesn't? I
25 don't really see that -- well, I don't see how I can resolve

1 Issue Five given the specific language of the rule without
2 also having some knowledge of what's going on with the Notice
3 of Apparent Liability. I mean, I've got no flexibility here.

4
5 And the same thing with the issues -- all the
6 forfeiture issues, Issue 1C, 2C, and 4C. It's just -- I don't
7 expect you to resolve this here today. I'm just pointing out
8 that I'm -- I have this dilemma. Now, maybe I'm the only one
9 that sees this as a dilemma in which case -- I don't know.
10 Maybe I'm just -- I'm paranoid here.

11 But if I could get some help from the Bureau or Mr.
12 Colby, maybe you could meet about this and stipulate as to
13 what in the world I'm supposed to do or maybe ask the
14 Commission to clarify this. I'm not going to certify anything
15 to the Commission on my own motion, but if there's a joint
16 motion, I'm likely to do it. I mean, why don't I have the
17 Bureau comment on this and then I'll let Mr. Colby comment?

18 MR. WEBER: The comment the Bureau would make is
19 that the Notice of Apparent Liability did reach certain
20 conclusions and assessed forfeitures for violations that it --
21 that it found that occurred during the auctions. The Order to
22 Show Cause sees the potential of additional violations and is
23 looking into those and that issues -- all the issues except
24 for Issue Three are -- and Five, which is kind of the catch-
25 all issue -- are trying to get the facts and circumstances

1 surrounding those additional violations. Those are
2 not things that the Notice of Apparent Liability is assessing
3 forfeitures for. While indeed it certainly does all surround
4 Commercial Realty and its conduct at the auction, it is
5 looking at separate instances of conduct or misconduct, and I
6 don't know if that really answers your question.

7 I do see your problem where until everything is at a
8 conclusion with the Notice of Apparent Liability, there's no
9 way you can actually judge Commercial Realty by what the
10 notice found because at this point, it is still just a notice.

11 JUDGE STEINBERG: I mean, I have a big problem with
12 that. Mr. Colby?

13 MR. COLBY: Well, let me cite some law from the
14 Communications Act which may -- might or might not clarify
15 matters.

16 JUDGE STEINBERG: I just happen to have a copy here
17 if you want to refer to it and it's the latest edition.

18 MR. COLBY: I think we're 511, but I won't be held
19 to that. But the provisions of the Communications Act that
20 deal with forfeitures are very interesting. If a forfeiture
21 is assessed by a Notice of Apparent Liability and the Notice
22 of Apparent Liability is later upheld by the Commission, the
23 Commission, to collect the forfeiture, must bring a trial to
24 the District Court and that trial is a trial de novo. In
25 other words, there is no finding of guilt in the final

1 analysis until there has been a trial in the District Court de
2 novo and the District Court has sustained the forfeiture.

3 Interestingly, however, there is an exception for
4 forfeitures which are imposed pursuant to a hearing. In the
5 event that a forfeiture is imposed pursuant to a hearing, the
6 sole remedy is for the victim of the forfeiture to take a
7 Dirksen (phonetic) Act appeal to United States Court of
8 Appeals for the District of Columbia circuit.

9 I believe he also has the right, under the Judicial
10 Review Act of 1950, to take that to a different circuit. But
11 -- no, I'm not sure of that in the case of forfeiture.
12 There's some special language on forfeitures. In any event,
13 his only remedy to a forfeiture assessed as the result of a
14 hearing is an appeal to the Appellate Court and he gets no
15 trial de novo.

16 So that would seem to say to me logically that what
17 the Congress intended was that somebody would get a hearing
18 sometime, that if there was a Notice of Apparent Liability
19 sustained by the Commission, then they'd get their hearing in
20 the District Court or in the alternative, if the Commission
21 decided to give them a hearing, that is their hearing and they
22 don't get any more hearings. The only remedy is to take an
23 appeal. So the logic of that would seem to be that
24 before a forfeiture can be imposed, there has to be a trial of
25 some sort, either at the Commission level, that is before Your

1 Honor, or in the District Court. That would seem to be the
2 logic of those sections.

3 JUDGE STEINBERG: I would perhaps suggest that in
4 one of your meetings, this be discussed, specifically the
5 language in Issue Five. Maybe what you need is a joint motion
6 to the Commission to just do away with that and the violations
7 of the rules -- Commission's rules as established and I -- you
8 know, Issue Five, to me, is just your normal last issue to
9 determine, in light of everything, what's going to happen, and
10 that maybe this stuff about the N.A.L. was a throw-in. I
11 don't know.

12 But I don't -- I don't really see how -- if we had
13 the hearing today and the record was closed, I don't see how I
14 could write a decision and resolve Issue Five until the N.A.L.
15 is totally resolved. And even then, if I said, well, the
16 misconduct proven before me is not sufficient, but when
17 combined with the N.A.L., is sufficient to barr the -- then
18 Mr. Colby, he's sitting in the catbird seat because he can run
19 right to the court and say, "I never got my hearing on the
20 N.A.L."

21 It just seems to me it's -- if these things are
22 supposed to be -- the N.A.L. and the Order to Show Cause is
23 supposed to be going on totally separate tracks, which is the
24 way I read it, then we shouldn't mix them up in Issue Five.
25 But I'm not -- I'm not going to do anything about it now. Why

1 don't you all discuss it and then see if you can come up with
2 a solution? And then you can present it to me.

3 If you both -- if you both agree on something, I
4 can't imagine I would not agree, and three heads are better
5 than one head. Is there -- is there anything that the Bureau
6 wants to raise about the scope of the issues?

7 MR. WEBER: No, Your Honor.

8 JUDGE STEINBERG: Mr. Colby?

9 MR. COLBY: No.

10 JUDGE STEINBERG: Now, let's talk about discovery.
11 I assume that you've met and you've talked about discovery and
12 if you want to just tell me briefly what you've done.

13 MR. COLBY: Well, the Bureau has served us with a
14 list of discovery items that they want and I've agreed to
15 produce them. I have served them with a list of discovery
16 items that I want and they are to be produced. Everything is
17 to be produced thirty days after -- the 24th?

18 MR. REIDELER: I believe that's correct.

19 MR. COLBY: So that means everything's due on April
20 23.

21 JUDGE STEINBERG: That's great. Any depositions?

22 MR. COLBY: I will take some depositions especially
23 of witnesses that were questioned during the Section 403
24 investigation that I have not yet have had an opportunity to
25 depose.

1 JUDGE STEINBERG: And I assume you'll all agree to a
2 deposition schedule and just, you know, keep me advised of the
3 schedule so that I can be out of the office that day so in
4 case any rulings are necessary, some other judge can do it.
5 Again, let the record reflect sarcasm.

6 MR. COLBY: Your Honor, I have an ethical matter
7 that I want to put on the record.

8 JUDGE STEINBERG: I'm going to get to that a little
9 later.

10 MR. WEBER: The Bureau also intends upon serving
11 interrogatories upon Commercial Realty.

12 JUDGE STEINBERG: Did you consider taking
13 depositions instead?

14 MR. REIDELER: I think we're going to do both, Your
15 Honor.

16 JUDGE STEINBERG: On the interrogatories, I don't
17 like interrogatories because what you do is you don't get the
18 answer of the witness, you get the answer of the lawyer. If
19 the interrogatories -- are you going to look for substance in
20 the interrogatories or are you going to look for who's got
21 knowledge of relevant facts? Because if it's just a list of,
22 "These are the facts. Tell us the names, addresses, and phone
23 numbers of who you know that has knowledge of these facts so
24 we can go question them," that's one thing. I don't mind
25 that. That's pretty straight-forward.

1 But as far as -- usually I'll limit you to just
2 depositions or interrogatories, but not both because
3 otherwise, it gets unwieldy. Does Mr. Colby have any --

4 MR. COLBY: I don't mind answering interrogatories,
5 but I don't think that they would -- I don't intend to use
6 interrogatories, except some of the information I requested
7 from the Bureau, in terms of documents, is really
8 interrogatory-type information, wanting to know who has
9 custody of things. But that is the limit that I would seek to
10 use interrogatories in this case.

11 MR. WEBER: I agree with Your Honor. The use of
12 interrogatories, they can tend to get very sanitized because
13 they're written by the lawyers. We do intend to find out more
14 than who has the relevant information-type of question.

15 JUDGE STEINBERG: Okay. I'll let you do that.

16 MR. COLBY: I would not preclude doing that myself
17 after I get the documents. If I find that there are a need to
18 know who has custody of something, I might serve
19 interrogatories.

20 JUDGE STEINBERG: Sure, because you have to go --
21 you have to know who to ask -- who to depose and who to ask
22 questions of. Okay, so why don't we leave that the way it is?
23 I'm going to give my standard spiel on discovery which is with
24 regard to discovery, make a good faith attempt to work out
25 your differences among yourselves which apparently you've been

1 doing which is good. A serious and genuine effort should be
2 made to compromise with each other.

3 Please don't come to me for a ruling on a discovery
4 matter without first attempting to reach an agreement. Only
5 if you can't reach an agreement, if you hit a brick wall, do I
6 want you to come to me for a ruling. But it looks like we're
7 getting cooperation from both ends which is really good. Are
8 there any other discovery matters we have to talk about? Mr.
9 Weber?

10 MR. WEBER: No, Your Honor.

11 JUDGE STEINBERG: Mr. Colby?

12 MR. COLBY: No, Your Honor.

13 JUDGE STEINBERG: Now, has any meeting taken place
14 concerning the possibility of stipulating uncontested facts?

15 MR. COLBY: Not at this time.

16 JUDGE STEINBERG: Or is it too early?

17 MR. COLBY: I think a little too early for that, but
18 I would think that there would be some stipulations reached --

19 JUDGE STEINBERG: I would just encourage that. It
20 would -- if we could narrow the hearing down as much as
21 possible, it'd be great. How about exploring the possibility
22 of whether we can have the entire direct cases in written
23 form?

24 MR. COLBY: Well, I'm planning to put mine in, in
25 written form.

1 MR. WEBER: The Bureau would be planning on the
2 same.

3 JUDGE STEINBERG: Because in my experience, it makes
4 -- it's much easier to prepare if you've got
5 -- if you know what somebody's going to say ahead of time.
6 It's easy for me to read.

7 MR. WEBER: And by written form, you do mean both
8 documents, not only written testimony.

9 JUDGE STEINBERG: Yeah, and the documents.

10 MR. COLBY: I will have some video tapes and that
11 raises an issue because we don't have the O.J. Simpson/Judge
12 Ito courtroom with a video player.

13 JUDGE STEINBERG: We'll all go to your house for
14 that session.

15 (Laughter.)

16 MR. COLBY: I don't know whether the tapes can be --

17 JUDGE STEINBERG: We've got a -- you just let me
18 sufficient, about a week or two in advance -- well, obviously
19 on the exhibit exchange date I'll know. Of course, you'll
20 exchange the tapes.

21 MR. COLBY: I'll exchange the tapes.

22 JUDGE STEINBERG: And then I'll arrange to have
23 stuff in this courtroom. I think -- yes, I think there's a
24 V.C.R. in the witness room. We can go drag it out of the
25 witness room and watch it. I think though what -- is the

1 video tape straight video tape without -- I mean, just video
2 without any audio?

3 MR. COLBY: No, it's just an ordinary video tape.
4 It is a promotional tape that was distributed by EON, about
5 five minutes in length. There is a promotional tape by Trade
6 Winds and I think I have -- I may also have an audio tape by
7 McNulty and Associates. I have been collecting these tapes
8 over the last several months and they're brief tapes. But
9 they'll be just ordinary, same kind of video tape you would
10 play in your home.

11 JUDGE STEINBERG: If there is audio associated with
12 the tape, have that transcribed so that we have it in writing
13 and we can --

14 MR. COLBY: All right. But there's audio on all of
15 the tapes.

16 JUDGE STEINBERG: And just -- when you exchange
17 that, exchange a transcript of the audio.

18 MR. COLBY: All right.

19 JUDGE STEINBERG: Now, I think we can get to the
20 possible conflict here and that's Paragraph 14 of the Order to
21 Show Cause, notes that Mr. Hartley testified that one of his
22 counsel, namely Mr. Colby, prepared the declaration under
23 penalty of perjury under -- of Mr. Tyler, which is one of the
24 subjects of Issue One, and my question was will Mr. Colby have
25 to testify in this case and if so, can he also act as counsel?

1 Was that your --

2 MR. COLBY: Well, if I have to testify, I cannot act
3 as counsel. But I think it would be a grave disservice to the
4 client if I were to testify because he has an absolute right
5 to confide in me anything he wants to and to have me not
6 violate that confidence. Now, if he were to say to me, "I
7 want you to testify because I think that your testimony will
8 help me," then the proper course, it seems to me, would be
9 for me to withdraw and testify and I'll have some other
10 lawyer, such as Mr. Avis, to try the case.

11 But it would be a grave violation of ethics for me
12 to say to you now what my testimony would be because my client
13 has a right to have me not testify and not to, in any way,
14 violate his confidence.

15 JUDGE STEINBERG: Mr. Weber, do you want to comment
16 on that? Or we can wait for the future to see what develops.

17 MR. WEBER: It may be best to wait at this time. We
18 may try, at a minimum, to reach some type of stipulation on
19 this to whatever Mr. Colby can state which does not violate a
20 confidence. There is conflicting testimony about who prepared
21 that statement and we do not even, at this time, know for a
22 fact Mr. Colby prepared it and if -- maybe we can discuss with
23 him later if he would stipulate just as to that answer. But
24 that should probably be done off the record.

25 JUDGE STEINBERG: Yeah. I'll just leave it up to

1 you and if it's necessary for me to rule, then I'll rule. But
2 there are -- I seem to remember when the D.C. bar changed the
3 ethics rules a couple years ago, they -- this is one aspect
4 that they did change, I think, the lawyer testifying. I don't
5 remember the details of it, but I remember reading it.

6 MR. COLBY: You're no longer automatically recused.
7 But that's not where I have the ethical problem. The place I
8 have the ethical problem is the same place I had the ethical
9 problem when the Commission sought to subpoena my office files
10 and I resisted those subpoenas.

11 Normally, the client -- and I read a lot of ethics
12 at that time, read a lot of cases including the very famous
13 United States Supreme Court case dealing with a pharmaceutical
14 company in which the lawyers and the pharmaceutical company,
15 Upjohn, had made an investigation of wrongdoing -- internal
16 wrongdoing and had all of these questionnaires from the
17 employees, and the Internal Revenue Service said, "Well, look,
18 these 22 employees are scattered all over the world. It would
19 be very difficult for us to interview all of the employees, so
20 why don't you just give us your questionnaires?"

21 And the Supreme Court said, "Well, it might be more
22 convenient for the I.R.S. to get the questionnaires from the
23 lawyers, but you can't do that because those are strictly
24 confidential." And so the I.R.S. had to go all over the world
25 interviewing the employees.

1 But the ethical principals involved in attorney
2 testimony and in turning over attorney files are about the
3 same. The client has a right to expect that anything he says
4 to his lawyer is confidential and that any document he gives
5 to his lawyer will be sacrosanct, form a part of the attorney
6 file, and never be willingly given to anyone without the
7 client's permission.

8 And that's the ethical dilemma I have, that I really
9 don't think I can testify as to a conversation between myself
10 and my client or the preparation of a document without
11 violating the cannons.

12 JUDGE STEINBERG: Unless he gives you permission.

13 MR. COLBY: Unless he gives me permission.

14 JUDGE STEINBERG: And then the question becomes how
15 broad a waiver would that be? Could you go into other things?
16 Could you go into other aspects of that transaction?

17 MR. COLBY: And there's other questions involved,
18 too, because I do not think that an adverse inference can be
19 drawn against the client's testimony merely because the client
20 does not give the attorney permission to testify. To do so
21 would also violate the privilege, it seems to me. So that's
22 another aspect to it.

23 JUDGE STEINBERG: Well, we'll, I guess, cross that
24 bridge later maybe. The next thing I have is Paragraph 25 of
25 the Order to Show Cause, assigns the burden of proceeding with

1 the introduction of evidence to the Wireless
2 Telecommunications Bureau. However, the burden of proof was
3 not mentioned.

4 This case is designated for hearing pursuant to
5 Section 312 of the Act and Section 312D requires that the
6 Bureau carry the burden of proof, also. And so I'm going to
7 rule that pursuant to Section 312D, the burden of proof on all
8 of the issues is assigned to the Bureau. Any comment on that?

9 MR. WEBER: We fully expected to have the burden of
10 proof in this proceeding.

11 JUDGE STEINBERG: Mr. Colby?

12 MR. COLBY: No comment.

13 JUDGE STEINBERG: Now, is there anything else that
14 needs to be talked about before we go off the record and talk
15 about the dates?

16 MR. COLBY: Yes, there is, and that is another
17 ethical problem that I have. I want to put it on the record
18 that I have advised my clients, James Hartley, Teresa Hartley,
19 and CRSPI, that at the moment, I think I can ethically
20 represent all three of them. I've also advised them, however,
21 that sometime during the course of the proceedings, it could
22 be possible that as a result of evidence developed, I might
23 find that there is a conflict between the interests of either
24 James and Teresa, or the corporation and James or Teresa, and
25 that I could not represent all three.